

Date: February 9, 1998

Case Nos.: 96-INA-00046
96-INA-00047
96-INA-00059
96-INA-00060
96-INA-00074

In the Matter of:

ALBERT EINSTEIN MEDICAL CENTER,
Employer

On Behalf Of:

GUILIANA De FRANCESCH,
IRENE SIA,
ILIANA MICALI,
Aliens

[96-INA-00046]
[96-INA-00047]
[96-INA-00074]

and

GRADUATE HOSPITAL,
Employer

On Behalf Of:

RIYADH S. HAMMOD,
BABIKER EL TAYEB,
Aliens

[96-INA-00059]
[96-INA-00060]

Appearance: Richard D. Steel, Esq.
For the Employer/Alien

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

Albert Einstein Medical Center and Graduate Hospital ("Employers") filed applications for labor certification to enable Guiliana De Francesch, Irene Sia, Iliana Micali, Babiker El Tayeb, and Riyadh S. Hammod ("Aliens") to fill the position of Resident PGY - II & III. While these cases involve two different employers, they have been consolidated because the positions and issues are similar. The job duties for the position are:

Evaluation and treatment of patients on general medicine, cardiology, hematology-oncology in-patient services; medical intensive care and coronary care units; emergency department; and hospital based out-patient clinics. Supervise first year residents and medical students. Hours: 8 a.m. to 5 p.m. Mon-Fri; 8 a.m. to 12 p.m. Sat; 8 a.m. to 9 a.m. on Sun. Obligatory calls: 5 p.m. to 8 p.m. every 4th night and if Saturday or Sunday to 8 p.m. (averages 50 hours a week).

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The requirements for the position are an M.D. or equivalent five-year degree in the field of Medicine. Other Special Requirements are:

Must have successfully completed PGY-1 position in ACGME-approved Internal Medicine program with excellent references from Chairman or Program Director and demonstrated excellence in clinical treatment. Must have Pennsylvania License and have passed FLEX examination or equivalent (*e.g.*, NMBE III or USMLE III). Must have demonstrated research capability as evidenced by publication or publications. Must have demonstrated excellent teaching skills.

The CO issued a Notice of Findings proposing to deny certification on the grounds that the Employers had not listed the offered job at the actual minimum requirements in violation of 20 C.F.R. § 656.21(b)(5), because the Aliens had gained the required one year of experience in the job offered or in PGY-I Internal Medicine while working with the Employers. The Employers were notified that they could rebut the finding by documenting the Aliens had the required experience prior to being hired, or by documenting that the Aliens gained the required experience working for the Employers in jobs not similar to the position for which labor certification is sought, or by deleting the requirements and readvertising. The CO also found that the requirements of “demonstrated excellent teaching skills” and “demonstrated research capability as evidenced by publication or publications” are unduly restrictive in violation of § 656.21(b)(2). The CO notified the Employers that they could rebut this finding by documenting the business necessity of the requirement or by eliminating the requirement and amending the application.

In rebuttal, the Employers contended that the Aliens had the required experience from completing the PGY-I program. The Employers argued that the medical residency program is not a continuum as the PGY-I is a very dissimilar position to a PGY-II or III position as the upper level position involves supervisory duties, there is no guaranteed promotion to a higher level, there are no minimum requirements for an entry level position, and training expectations are significantly different. The Employers contended that demonstrated excellent teaching skills and demonstrated research capabilities are fundamental aspects of the position as training and research skills are prerequisites to complete the junior positions and are referenced in the ACGME manual.

The CO issued the Final Determination denying certification because the Aliens’ experience as PGY-I with the Employers is not in a dissimilar position, as the residency program is a continuum. Accordingly, the CO found that the Employers had not listed the position at the actual minimum requirements in violation of § 656.21(b)(5). The CO found that the Employers had adequately rebutted the findings that the requirements of teaching and research skills were unduly restrictive.

The Employers requested review of the denial of labor certification. The CO denied reconsideration and forwarded the records to this Board of Alien Labor Certification Appeals (“BALCA” or “Board”).

Discussion

In the NOFs, the CO stated that the Employers must document that their requirements for the job opportunity represent the Employers' actual minimum requirements for the job opportunity, and that they must establish that they have not hired workers with less training or actual experience for jobs similar to that involved in the job opportunity, or that it is not feasible to hire workers with less training and experience than that required by the Employers' job offer. See § 656.21(b)(5).

Where the alien does not possess the employer's stated minimum job requirements, certification is properly denied under § 656.21(b)(5). *Marston & Marston, Inc.*, 90-INA-373 (Jan. 7, 1992). An employer must establish that the alien possesses all the minimum stated requirements for the position. *Charley Brown's*, 90-INA-345 (Sept. 17, 1991). In this case, the Employers' requirements include "must have successfully completed PGY-1 position in ACGME approved internal medicine program." All Aliens had completed a PGY-1 position, but it was with the Employers. Where an alien gains experience with the employer, that experience can only constitute qualifying experience if it was in a job that was "sufficiently dissimilar" to the job offered. *Brent-Wood Products, Inc.*, 88-INA-259 (Feb. 28, 1989) (*en banc*); *The Cinnamon Buns, Inc.*, 93-INA-99 (July 6, 1994). Factors to be considered when determining whether jobs are sufficiently dissimilar include, but are not limited to: the relative job duties, supervisory responsibilities, job requirements of the positions, the positions of the jobs within the employer's hierarchy, the employer's prior employment practices, whether and by whom the "higher" position has been filled previously, whether the "higher" position is newly created, the percentage of time performing each job duty in each job, and the respective salaries or wages. *Delitzer Corp. Of Newton*, 88-INA-482 (May 9, 1990) (*en banc*); see also, *Singletary Auto Body*, 94-INA-55 (Dec. 21, 1994).

Regarding the position of PGY-I, the Employers describe the duties as being,

responsible for the admission history and physical, all orders, daily progress notes, as well as review and follow-up of laboratory and radiologic studies. The intern is expected to review his/her findings with the senior resident on service and to keep the senior resident apprized of any significant changes in patient status. The intern is responsible for seeing every patient on service at least daily and for attending to all of the day-to-day details of patient care.

(AF 15). The PGY-I or "intern" position is described as the "junior house officer on every team," and has no supervisory responsibility (AF 15, 20). Training expectations for this position are "to complete and document patient care in an appropriate and timely manner," to discuss significant changes in patient status with senior resident and supervising attending physician, to attend lectures, conferences, and clinics, and follow other hospital guidelines (AF 20). The salary for the PGY-I position is "less than \$32,000." Approximately 80% of interns (PGY-I's) are promoted to the senior resident level within one year. Some interns are accepted into the program for one year only, then enter specialty programs such as Radiology, Dermatology, etc. Promotion is not guaranteed, and contracts are written for one year only (For Albert Einstein Medical Center) (AF 17).

The Employers describe the position of PGY-II (or senior resident) as,

supervisory and teaching in nature. The senior resident is the functional supervisor of junior residents and is the key link between interns and medical students and the attending physician. The senior resident is assigned as the team leader. . . . [and] is responsible for seeing every patient at the time of admission and for reviewing the admission history and physical exam and orders with the intern [and for] insuring the accuracy of the history and physical exam and appropriateness of the orders. The senior resident rounds on every patient, oversees the day-to-day details of patient care, provides guidance and supervision to the interns, and serves as a resource for the team. The senior resident also insures that the attending physician is made aware of significant changes in patient status and is appropriately involved in the decision-making process. The senior resident has primary responsibility for approving and organizing the transfer of patients between inpatient services and critical care units, and between the medical service and other specialty services. The senior resident attends discharge planning rounds and interacts with nursing, pharmacy, social work, and other hospital staff. On the coronary care and intensive care units, the senior resident holds overall supervisory and teaching responsibilities. All admission decisions to an inpatient medical floor or critical care unit and all emergency codes are the responsibility of the senior resident, . . . [who] also spends a significant amount of time preparing for the American Board of Internal Medicine Certification Examination.

(AF 16). PGY-II level application requires a written recommendation of the intern's performance at the PGY-I level by their Program Director, and excellent reference letter from two or more physicians. The salary for senior residents starts in excess of \$33,000 and can be in excess of \$36,000 per year (AF 17).

The CO contends that the positions are part of a continuum with both jobs being essentially the same as they are providing "basic patient care" (AF 7). The Employers argue that the positions are not a continuum because each position has distinct duties, must be separately applied for, and not all individuals advance to the higher position (AF 9-10). While the evidence presented shows that approximately 80% of the individuals hired as interns in the PGY-I position advance in one year and are hired as residents in the PGY-II position, it also shows that some interns choose to leave after one year to pursue other specialties, others are not accepted as residents, and others may "require remediation and may take from one and one-half to two years to complete the internship." The difference in salaries can be as little as one thousand dollars or more than four thousand dollars. The greatest distinction lies in the responsibilities of the positions. The PGY-I position has no supervisory responsibilities of any kind, and no responsibilities that involve direct interaction with other hospital staff, other than through the senior resident. The PGY-II position has numerous supervisory and teaching responsibilities, and direct interaction with nursing, pharmacy, social work, and other hospital staff.

While a panel has held that a junior psychiatric resident was similar to a senior psychiatric resident, that decision was based on the employer failing to sufficiently document the differences in the positions, and is not a standard regarding medical residency programs. *Maimonides Medical Center*, 93-INA-534 (Apr. 4, 1994). In this case, the Employers have

submitted detailed documentation regarding the differences in the positions. Based on the evidence of record, we find that the Employers have established that the positions are sufficiently dissimilar requiring different supervisory, teaching, and staff interaction responsibilities. See *Deloitte & Touche*, 90-INA-493 (Feb. 7, 1992); *Coopers and Lybrand*, 92-INA-240 (July 26, 1993); see also, *City of Danbury Engineering Department*, 95-INA-00069 (August 16, 1996). Thus, there is no violation of § 656.21(b)(5).

Based on the foregoing, we find that the CO's denials of labor certification in these cases must be reversed.

ORDER

The Certifying Officer's denials of labor certification are hereby **REVERSED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

